IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : N A G P U R.

LETTERS PATENT APPEALS NOS. 38 OF 2006 AND

39 OF 2006

(1) L.P.A. No. 38/06

1. Saraswati Education Society,
   through its Secretary,
   Post Thanegaon, Tah. Tirora,
   District Gondia.

2. Swami Vidyalaya,
   through its Head Master,
   Post Chikhali, Tah. Tirora,
   District Gondia. ....**APPELLANTS.**

- VERSUS -

1. Santosh s/o Bhaulal Rahangdale,
   r/o Khamri, Post Chikhali,
   Tahsil Tirora, District Gondia.

2. Education Officer (Secondary),
   Zilla Parishad, Bhandara. ... **RESPONDENTS.**

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Mr. Prashant Shende Advocate for the Appellants.

Mr. A.S. Chandurkar Advocate for Respondent No. 1.
Respondent No.2 served.

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(2) L.P.A. No.39/06

1. Saraswati Education Society,
   through its Secretary,
   Post Thanegaon, Tah. Tirora,
   District Gondia.

2. Swami Vidyalaya,
   through its Head Master,
   Post Chikhali, Tah. Tirora,
   District Gondia. ....**APPELLANTS.**

- VERSUS -

1. Gaurishankar Jaipal Patle,
   r/o Khamri, Post Chikhali,
   Tahsil Tirora, District Gondia.

2. Education Officer (Secondary),
   Zilla Parishad, Bhandara. ... **RESPONDENTS.**

....

Mr. Prashant Shende Advocate for the Appellants.
Mr. A.S. Chandurkar Advocate for Respondent No. 1.
Respondent No.2 served.

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CORAM : R.M.S. KHANDEPARKAR &
S.R. DONGAONKAR, JJ.
DATE : 08. 08.2006.

ORAL ORDER (Per R.M.S. Khandeparkar, J.) :

When the matters came up for hearing, a preliminary objection was sought to be raised on behalf of the respondent no.1 about the non maintainability of these appeals on the ground that the appellants had earlier preferred similar appeals against the impugned orders and they were withdrawn unconditionally and, therefore, the present appeals against the same orders which was sought to be impugned in the earlier appeals and which were withdrawn, are not maintainable.

2. The learned Advocate for the appellants drawing the attention to the averments in the appeal memo submitted that the earlier L.P.As. were withdrawn as this Court had opined that the appellants could seek review of the orders which were sought to be impugned in those appeals and that the appellants were allowed to withdraw those appeals. Attention has also been drawn to the

decision of Apex Court in **Haryana State Coop. Land Development Bank v. Neelam – (2005) 5 SCC 91** in support of the contention that the principle of *res judicata* is not applicable when the appeals were withdrawn without any adjudication of the matter on merits and therefore the second L.P.A. would be maintainable.

3. The present L.P.As are filed against the orders of 29.10.2004 in Writ Petitions No.2337 and 2338 of 2004 respectively whereby the learned Single Judge has dismissed those writ petitions. It is not in dispute and it is also a matter of record that earlier L.P.As. No. 209 and 210 of 2004 respectively were filed against the impugned orders and both the L.P.As. came up for hearing on admission on 15.12.2004, on which date upon hearing the Advocate for the appellants, the following orders were passed -

> "On the motion made by the learned counsel for appellant, the appellant is allowed to withdraw the appeal.
>
> The same is disposed of as withdrawn.

No order as to costs."

4. It is the case of the appellants that after the withdrawal of the appeals, the appellants filed Review Application against the impugned orders. However, the same came to be dismissed by the orders dated 7.7.2005 and that there being no alternative remedy left to the appellants, they have filed the present appeals.

5. In the memo of appeals, it has been specifically stated thus :

> "The said appeal was listed before the Division Bench of this Hon'ble Court for admission on 15.12.2004 and after hearing the appellants, the Hon'ble Division Bench was of the opinion that the appellants may seek review of the said order and on that understanding, the Hon'ble Division Bench granted liberty to the appellants to withdraw the said appeal with oral liberty/suggestion to move an application for review before the Single Judge."

6. As already seen above, the order dated 15.12.2004 in

both the earlier appeals specifically recorded withdrawal of the appeals on motion being made in that regard by the counsel for the appellants. There is no whisper about any suggestion being made by the Court or opinion having been expressed by the Court regarding the availability of remedy of review to the appellants in relation to the impugned orders. It is not understood on what basis the alleged understanding was arrived at by the appellants for the purpose of withdrawal of the appeals. Be it as it may, the fact remains that the appeals were withdrawn unconditionally. The record of the Court in that regard in both the appeals is very clear.

7. Order XXIII Rule 1(4) of the Code of Civil Procedure provides that where the plaintiff (a) abandons any suit or part of claim under sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject

matter or such part of the claim. This provision of law, therefore, clearly provides that in case of abandonment of any suit or even a part of such claim or withdrawal of such suit or part of such claim without prior permission in that regard in terms of the law comprised under sub-rule (3) of Order 23 Rule (1), the plaintiff would be precluded from instituting any fresh suit in respect of same subject or part of the claim so abandoned or withdrawn.

8. Sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure provides that where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Undisputedly, the appellants herein had not sought permission from this Court to withdraw the appeals with any such

liberty.

9. Rule 28 of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960 provides that Rules applicable to Civil Appeals and Applications, shall except otherwise provided in the said Chapter apply *mutatis mutandis* to Writ Petitions.

10. Section 107(2) of the Code of Civil Procedure provides that subject to what is provided in sub-rule(1) thereto, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the said Code on Courts of original jurisdiction in respect of suits instituted therein. Obviously, therefore, the provisions of Order XXIII Rule 1 of the Code of Civil Procedure are applicable to the proceedings in writ petitions or any proceeding arising out of writ petitions and for the same reasons this provision would also apply to the proceedings in L.P.As. unless they are specifically excluded under Letters Patent. There is no such exclusion in relation to the provisions of Order XXIII Rule 1, and hence the same provision

would apply to the proceedings in L.P.As.

11. Considering the provisions of law, as stated above, when the L.P.As. filed by the appellants were withdrawn on 15.12.2004, without any leave being obtained from the Court in terms of the provisions of Rule 28 of Chapter XVII of the Bombay High Court Appellate Side Rules read with Section 107(2) and Order XXIII Rule 1 of the Code of Civil Procedure, the appellants are not entitled to file fresh or second L.P.As. against the impugned orders.

12. As regards the decision of the Apex Court in *Haryana State Coop. Land Development Bank's case, supra,* which was on the point of res judicata, the Apex Court therein had ruled thus :

> "The writ petition filed by the respondent concededly was not adjudicated on merit. Apparently, she did not avail the alternative remedy which was more efficacious. Before the Labour Court even disputed questions of fact could be gone into and adjudicated upon which would ordinarily not be permissible in a

writ proceeding. If the respondent had made a prayer for withdrawal of a writ petition on the said ground, she cannot be denied the remedy available to her in another jurisdiction in terms of the provisions of the statute. The principles embodied in Order 23 Rule 1 of the Code of Civil Procedure laying down a public policy are not applicable to a case of this nature. A writ petition filed by the respondent could have been dismissed even on the ground that another alternative remedy which was more efficacious was available and furthermore on the ground that the writ court would not go into the disputed question of fact. Even in such an event, it was open to the respondent herein to approach the Labour Court or to take recourse to other remedies which were otherwise available to her." (emphasis supplied).

13. The above decision is on the point that when the writ petition is withdrawn without any liberty being obtained from the Court to pursue the alternative efficacious remedy available to the petitioner, even in those circumstances, if the statutory provisions permit such petitioner to avail any such remedy in any Court, the

same cannot be denied to such party merely on the ground of failure on the part of the petitioner to take liberty in that regard while withdrawing the petition. The said observation is made bearing in mind the public policy sought to be incorporated in the provision comprised under Rule 1 of Order 23 of the Code of Civil Procedure. The said proposition cannot be applied to a case where the provision of law specifically prohibits initiation of second proceeding in relation to the same subject matter when the first proceedings in that regard were withdrawn without liberty to file fresh proceedings. In the case in hand, there is a specific statutory provision comprised under Rule 28 of the Bombay High Court Appellate Side Rules which says that the Rule would apply to the writ petition. The earlier appeals were arising out of the order passed in writ petitions. Obviously, therefore, the provision applicable to civil appeals would apply to the appeals filed arising out of the order passed in writ petition. Being so, the provision of Rule 28 would apply to the proceedings in L.P.A. That was not the

matter before the Apex Court in case cited supra. Besides, the proceedings were sought to be initiated before the Labour Court consequent to the withdrawal of the writ petition and in that regard the observations were made, which have no application to the matter in hand.

14. As regards the contention of the appellants in the appeal that the earlier appeals were withdrawn on an understanding that the appellants were at liberty to move for review of the petition against the impugned orders and that the same was pursuant to the opinion/suggestion expressed by the Division Bench, since no such opinion or suggestion is reflected from the Court record or in the order, the contention in that regard cannot be accepted. Undisputedly, the appellants have not filed any affidavit in the appeals which were withdrawn consequent to the order of 15.12.2004 to the effect that the said withdrawal was pursuant to the suggestion/opinion expressed by the Court, the contention of the appellants in the present appeals which have

been filed nearly seven months after the withdrawal of the said appeals, cannot be accepted. It is apparently an after thought to justify the lapse on the part of the appellants to seek leave at the time of withdrawal of the earlier appeals.

15. For the reasons stated above, therefore the respondents are justified in raising the objection regarding non maintainability of fresh L.P.As against the impugned orders consequent to the withdrawal of the earlier appeals without leave to file fresh appeals. Hence, the L.P.As. being not maintainable, the same are dismissed in limine . There shall be no order as to costs.

JUDGE JUDGE

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